Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6632

MINOR MOODY,

Petitioner,

v.

LOREN DAGGETT, *Warden,*
United States Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

QUESTION PRESENTED

Whether a parolee who has been convicted of a new crime committed while on parole is entitled to a timely *Morrissey* hearing prior to a decision by the Parole Board to let the warrant and detainer remain in effect.

REGULATION INVOLVED

40 Fed. Reg. 10583 (March 10, 1975)
Former Title 28 C.F.R.

§2.53 Warrant placed as a detainer and dispositional interview.

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined. At such dispositional interview the prisoner may be represented by counsel of his own choice and may call witnesses in his own behalf, provided he bears their expenses. He shall be given timely notice of the dispositional interview and its procedure.

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand

(2) Withdraw the detainer and close the case if the expiration date has passed;

(3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant

is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

(c) In all cases, including those where a dispositional interview is not conducted, the Board shall conduct annual reviews relative to the disposition of the warrant. These decisions will be made by the Regional Director. The Board shall request periodic reports from institution officials for its consideration.

STATEMENT

On February 12, 1962, petitioner was sentenced by a United States District Judge to a term of ten years in prison. After serving four years and three months of that sentence, petitioner was paroled (A.9).

Subsequently, petitioner was convicted of manslaughter and, on February 6, 1976, was sentenced to a term of ten years' imprisonment by the United States District Court for the District of Arizona (A.3). While petitioner was in custody on the intervening sentence, the United States Board of Parole lodged a parole violation detainer against him (A.9).

During 1972 petitioner asked the Board to execute the detainer. By letter dated October 18, 1972, the Board refused to do so, saying:

> The Board has indicated it intends to take you into custody as a federal parole violator at such time as you are released from the sentence for which you are now confined. (A.9).[1]

---

[1]While the record here does not disclose any other information about petitioner or the events which transpired, the omissions are not determinative of the legal issue presented by this case.

On January 22, 1976, apparently with the detainer pending, petitioner filed an application for a writ of habeas corpus, asserting that his parole revocation hearing had not been granted in more than three years and that he was unfairly denied a determination of the charges. He sought dismissal of the warrant (A.10).

The district court dismissed the petition, stating that a revocation hearing was not required until the warrant was executed, and that the Board had no obligation to execute the warrant because petitioner was in custody on the intervening sentence (A.11), citing the Tenth Circuit precedent, *Small v. Britton*, 500 F.2d 299 (1974).

On May 7, 1975, the United States Court of Appeals for the Tenth Circuit affirmed the dismissal on the authority of *Small v. Britton, supra.*

SUMMARY OF ARGUMENT

A parolee who, by the commission of a new crime, violates his parole, has liberty interests in the length of the total period of his custody and in the conditions of his confinement. These interests are contingent upon the Parole Board's decision whether to withdraw, execute, or continue the parole violation warrant lodged as a detainer with the custodial institution. If the Board permits the detainer to stand, the parolee is deprived of the concurrent running of his original term of custody with his new intervening sentence. Moreover, it is likely that he will never receive his earned good time credit and credit for the period of his release on parole prior to the violation. In addition, the presence of the

warrant lodged as a detainer affects his prison classification status and institutional program, as well as his eligibility for specific rehabilitative programs.

The parolee sustains a grievous loss of his liberty interests if the Board permits the warrant to remain in effect rather than choosing a more favorable disposition. Therefore, *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), require that the dispositional decision be made only after a timely due process hearing, as prescribed by *Morrissey*. The financial and administrative efforts of providing such hearings are minimal.

Because the Board gave petitioner no hearing prior to its decision to permit the detainer to stand, petitioner is entitled to issuance of the writ of habeas corpus if the delay caused prejudice, or in the alternative, an immediate due process parole revocation hearing.

ARGUMENT

A PERSON WHO HAS BEEN CONVICTED OF A NEW CRIME WHILE ON PAROLE HAS LIBERTY INTERESTS AFFECTED BY THE DISPOSITION OF THE PAROLE VIOLATION WARRANT. THIS DISPOSITIONAL DECISION MADE BY THE PAROLE BOARD MAY CAUSE SUBSTANTIAL GRIEVOUS LOSS AND THEREFORE SHOULD BE PRECEDED BY A TIMELY *MORRISSEY* HEARING.

The Court has held that the liberty of a parolee is protected by due process and may be terminated after a

violation only by "orderly process." *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972). The interest in liberty is at stake whatever the nature of the violation which has resulted in the revocation process. Accordingly, where, as here, the violation is a conviction for a new crime rather than a technical violation of parole, a timely hearing under *Morrissey v. Brewer, supra*,[2] is nonetheless required.[3]

The Government asserts, however, that there are no constitutional protections necessary once a violation has been established, for the parolee is then subject to the unfettered discretion of the Parole Board and has no liberty interest at stake (Memorandum for Respondents in response to petition for writ of certiorari, Doc. No.

[2]Since under the newly promulgated rules of the United States Parole Commission, effective May 14, 1976 [28 C.F.R. §2.57; 41 Fed.Reg. 19340 (May 12, 1976)], any order of the United States Board of Parole entered prior to that date is valid [28 C.F.R. §2.57; 41 Fed.Reg. 19340 (May 12, 1976)], this case is not affected by the Parole Commission and Reorganization Act, P.L. 94-233, 94th Cong., 2d Sess.; 90 Stat. 219 *et seq.* (1976). The Parole Board's decision in this case was dated October 18, 1972, and, under the Government's position, if the order is valid petitioner is constitutionally entitled to no hearing.

[3]Indeed, the Seventh, Eighth, and District of Columbia Circuits have concluded that a parolee convicted of a new crime has a sufficient liberty interest to require the protection of a timely *Morrissey* hearing. *Jones v. Johnston*, Doc. No. 74-1424 (D.C. Cir. March 23, 1976); *United States ex rel. Hahn v. Revis*, 520 F.2d 632 (7th Cir. 1975), mandate recalled, No. 74-1057 (August 27, 1975); *Cleveland v. Ciccone*, 517 F.2d 1082 (8th Cir. 1975).

76-6632 at 9-10 and n.7).[4] The Government also argues that if a hearing is required to determine disposition the procedure already provided by the Board is sufficient, and a delayed revocation hearing is adequate.[5]

[4]This threshold posture taken by the Government is more extreme than that of *Small v. Britton*, 500 F.2d 299 (10th Cir. 1974), the precedent upon which both the district court and the court of appeals relied to deny the application for writ of habeas corpus in this case. *Small* held that while a parolee was entitled to the *Morrissey* hearing at the completion of his intervening sentence, the Board was not required to give him that hearing earlier. The court of appeals reasoned that the hearing was not required until the warrant was executed by taking the parolee into Federal custody on the parole warrant. The issue determined by the courts of appeal has been the timeliness of the hearing, not whether it will take place at all. *Jones v. Johnston, supra*, slip op. at 33; *Reese v. United States Board of Parole*, 530 F.2d 231 (9th Cir. 1976), *petition for cert. filed* May 3, 1976, Doc. No. 75-6703; *United States ex rel. Hahn v. Revis, supra*, 520 F.2d at 635-636, 638; *Gaddy v. Michael*, 519 F.2d 669, 671 (4th Cir. 1975), *petition for cert. filed* August 5, 1975, Doc. No. 75-5215; *Cleveland v. Ciccone, supra*, 517 F.2d at 1086; *Cooper v. Lockhart*, 489 F.2d 308, 309-310 (8th Cir. 1973); *Cook v. United States Attorney General*, 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974).

[5]Six circuits have held that no hearing need be granted prior to the end of the intervening sentence. *Reese v. United States Board of Parole, supra; Gaddy v. Michael, supra; Orr v. Saxbe*, No. 74-341 (M.D. Pa. November 27, 1974), *aff'd. without opinion*, 517 F.2d 1390 (3d Cir. 1975), *petition for cert. filed sub nom. Reese v. Levy*, October 10, 1975, Doc. No. 75-5594; *Colangelo v. United States Board of Parole*, No. 74-251 (W.D. Ohio December 11, 1974), *aff'd. without opinion*, 517 F.2d 1404 (6th Cir. 1975); *Small v. Britton, supra; Cook v. United States Attorney General, supra.*

A. A parolee who has been convicted of a new crime while on parole has liberty interests in the length of his custody and the conditions of his confinement.

1. The disposition of the warrant determines whether the original sentence will continue to run and whether the parolee shall receive credit for good time and for the period on parole prior to the violation.

Under former 28 C.F.R. §2.53(b) (1975), the rule in effect when petitioner requested execution of his detainer,[6] the Board had available to it three methods of dealing with the parole violation warrant. It could have withdrawn the warrant and detainer, executed the warrant, or, as it did here, permitted the warrant to remain in effect, thereby leaving the detainer undisturbed.

Had the Board lifted the detainer and withdrawn its warrant, petitioner would have been in the status he had at the time of his release on parole. His original sentence would have continued to run, and he would

[6]Former 28. C.F.R. §2.53(b), 40 Fed. Reg. 10983 (March 10, 1975) states:

> (b) Following the dispositional review the Regional Director may:
>
> (1) Let the detainer stand
>
> (2) Withdraw the detainer and close the case if the expiration date has passed;
>
> (3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.
>
> (4) Execute the warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

This rule was preceded by one [32 Fed. Reg. 15014 (October 31, 1967)] in which the dispositional possibilities were the same.

not have been deprived of good time credit[7] or credit for the period while on parole (street time). Former 28 C.F.R. §2.53(b)(3) (1975).

If the Board had executed the detainer, the time on the original sentence would have commenced to run from the moment of execution. Former 28 C.F.R. §§2.53(a); 2.53(b)(4) (1975).[8] Although petitioner would have lost street time and good time,[9] the original sentence would have run concurrently with the intervening sentence from the moment of the Board's decision. Former 28 C.F.R. §2.53(b)(4) (1975); *Melson v. Sard*, 402 F.2d 653, 654 (D.C. Cir. 1968); *Smith v.*

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[7]18 U.S.C. §4161 (1970) states, in relevant part:

> Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:
>
> . . . .
>
> Ten days for each month, if the sentence is ten years or more.

[8]Issuance of the parole violation warrant stops the sentence from running from the date of the violation, and execution of the warrant starts the time running again. Former 18 U.S.C. §4205 (1970), *repealed*, P.L. 94-233, 94th Cong., 2d Sess., §2; 90 Stat. 219; former 28 C.F.R. §2.51 (1975); *Zerbst v. Kidwell*, 304 U.S. 359 (1938).

[9]Former 18 U.S.C. §4205 (1970); former 28 C.F.R. §2.51 (1975); *Peacock v. Hughes*, 427 F.2d 359 (5th Cir. 1970); *Canavari v. Richardson*, 419 F.2d 1287 (9th Cir. 1969); *McKinney v. Taylor*, 358 F.2d 689 (10th Cir. 1966).

Rivers, 388 F.2d 567, 575 (D.C. Cir. 1967); *Mock v. United States Board of Parole*, 345 F.2d 737 (D.C. Cir. 1965).

The third disposition under the Board's rules, the one made here, was to permit the detainer to stand. Former 28 C.F.R. §2.53(b)(1) (1975). This disposition continued the cessation of the original sentence, and required the parolee to serve his original sentence consecutively to the intervening period of incarceration. It extended the parolee's maximum expiration date, since the parolee receives no credit on his original sentence while serving the intervening sentence. There is also the substantial likelihood that at the end of the intervening sentence he will lose credit for his parole release time and his earned good time. See *Jones v. Johnston*, Doc. No. 74-1424, slip op. n.16 at 16-17, 25 (D.C. Cir. March 23, 1976); *Cleveland v. Ciccone*, 517 F.2d 1082, 1086 (8th Cir. 1975).

Thus, the Board's determination to allow the detainer to stand carried with it a serious deprivation of petitioner's freedom, as had the administrative decisions rendered in *Morrissey* and *Scarpelli*. By its decision, the Board insured that the original term could not run concurrently with the new sentence, and that petitioner would probably lose credit for the good time he may have earned by satisfactory prison behavior as well as credit for the period he was on parole prior to the conduct which constituted the violation. As a result of the decision, petitioner faces an additional period of custody of up to five years and three months after completion of his present period of incarceration. Consequently, petitioner has a substantial interest in the timely disposition of the warrant.

2. The pendency of the detainer affects conditions of confinement.[10]

The detainer has an effect on the assignment of classification and prison programming, both of which are, by Bureau of Prisons regulations, protected interests. The purpose of custody classification is "to assure the orderly operation and security of the institution, community protection, to provide a means for assigning quarters, details and community activities" [Bureau of Prisons Policy Statement No. 7300.112 (April 8, 1976)], and for development of an individual program plan and treatment. Bureau of Prisons Policy Statement No. 7200.11A (March 6, 1972). The standards for assigning classification set out by the Bureau are, *inter alia*, degree of escape risk, history of violent behavior, length of sentence, type of offense, prior record, threats against Government officials, institutional adjustment, and the demonstrated ability to function with limited or no supervision. Bureau of Prisons Policy Statement No. 7300.112 ¶5 (April 8, 1976).

Not only is the classification assignment and program for each inmate made in accord with the standards established by the Bureau of Prisons, but the Bureau's regulations also prohibit increase in restrictive custody when the inmate is transferred from one institution to another unless there are circumstances which warrant an increase and the reasons for the increase are documented.

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[10]This claim does not go to the validity of the initial lodging of a detainer when a judgment is rendered. The act of lodging a detainer is comparable to detaining a parolee after the preliminary hearing deemed necessary by *Morrissey*.

Bureau of Prisons Policy Statement No. 7300.112 ¶7 (April 8, 1976). Further, even if the transfer, with its potential loss of classification status, is for disciplinary reasons, the transfer may be made only after notice is given and a hearing is held at which the inmate may call witnesses and present evidence. Bureau of Prisons Policy Statement No. 7400.5D ¶9(c); 9(d)(6) (July 7, 1975). Thus, the Bureau's regulations have created a liberty interest in classification and programming determined and modified by specific standards in accord with specific procedures. *Wolff v. McDonnell*, 418 U.S. 539 (1974); see *Meachum v. Fano*, 44 U.S.L.W. 5053, 5057 (Sup. Ct. June 25, 1976); *Montanye v. Haymes*, 44 U.S.L.W. 5051 (Sup. Ct. June 25, 1976).

A detainer is one factor considered in the initial classification. Bureau of Prisons Policy Statement No. 7200.11A §§5(D)(2)(b) at 4; 6(A) at 5 (March 6, 1974.[11] The detainer is treated as an element separate from the circumstances of the new crime [see *id.* at §5(D)(1)(a), (b)] and has an independent effect on classification. An inmate is adversely affected by a detainer because he is considered a higher escape risk [see Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q. 417, 419; Bennett, *The Last Full Ounce*, 23 Fed.

[11]On the effects of detainers, see generally *Jones v. Johnston*, *supra*, slip op. at 11-12, 22-23; *United States ex rel. Hahn v. Revis*, *supra*, 520 F.2d at 637; *Cooper v. Lockhart*, *supra*, 489 F.2d at 313-315; S.Rep. No. 91-1356, 91st Cong., 2d Sess. (November 23, 1970), reproduced at 1970 U.S. Code Cong. & Admin. News 4864, 4866; Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 Geo. Wash. L. Rev. 175, 228-230 (1970); Note, *Detainers and the Correctional Process*, 1966 Wash. U.L.Q. 417, 418-422.

Prob. No. 2 at 20-21 (1959); *Lawrence v. Blackwell*, 298 F. Supp. 708, 714 (N.D. Ga. 1969)], and because the presence of the detainer indicates the likelihood of an additional period of incarceration. Both are factors considered in classification.[12]

[12]The Government asserts that it is not the detainer which produces these results, but decisions of the custodian. However, the custodian's actions are in response to the detainer (*Cooper v. Lockhart*, *supra*, 489 F.2d at 313) and he acts as agent for the jurisdiction issuing the detainer. See *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 498-499 (1973). *Cf. State Board of Regents v. Roth*, 408 U.S. 562, 573-574 (1972).

In *Gaddy v. Michael*, *supra*; *Cook v. United States Attorney General*, *supra*; and *Orr v. Saxbe*, *supra*, the courts concluded that it was not the detainer but the underlying facts of the new crime and the fact of the parole violation which affected classification. However, both the underlying facts and the pendency of the detainer have effects on classification. Further, the purpose of a parole revocation hearing is to reveal information about the new crime as well as other mitigating facts.

The United States Bureau of Prisons itself has recognized the deprivations caused by a detainer:

> [U]ncertainty as to status can have an adverse effect on our efforts to provide offenders with correctional services; we should encourage detaining authorities to dispose of pending untried charges against offenders in Federal custody.
>
> The casework staff at all institutions may cooperate with and give assistance to offenders in their efforts to have detainers against them disposed of either by having the charges dropped, by restoration of probation or parole status, or by arrangement for concurrent service of the state sentence.
>
> . . . .
>
> The presence of a detainer oftentimes has a restricting effect on efforts to involve the offender in correctional

(continued)

Furthermore, whenever a detainer is lodged, its seriousness, which is determined in part by the ultimate sentence to be served on the violation, is considered in classification and programming. Bureau of Prisons Policy Statement No. 7300.112 ¶4 (April 8, 1976); Bureau of Prisons Policy Statement No. 7500.72 ¶4 (May 8, 1972). The sentence which must be served by the parolee for the parole violation is, of course, determined by the Parole Board.

The detainer must also be considered in classification reductions. Bureau of Prisons Policy Statement No. 7300.112 ¶4 (April 8, 1976). It is highly relevant to appraising the inmate's ability to function with limited supervision, a factor which must be considered in giving minimum or community custody. Minimum custody renders the inmate eligible for the least secure housing facilities, honor camps, and farms, and work outside the institution with reduced supervision. Bureau of Prisons Policy Statement No. 7300.112 ¶5(d) (April 8, 1976). This type of custody is required for work/study release [Bureau of Prisons Policy Statement No. 7500.20B ¶4(c)(2) (November 16, 1971)] which enables the inmate to earn meritorious good time (*id.*, ¶4(e) at 5).

The lowest level of custody – community custody -- is necessary for release on furloughs. Bureau of Prisons Policy Statement No. 7300.12D ¶5(c)(1)(b) (March 19, 1976).

(footnote continued from preceding page)

programs. For this reason, caseworkers at Federal institutions are expected to assist offenders in their efforts to have detain[ers] disposed of.

Bureau of Prisons Policy Statement No. 7500.14A at 1 (January 7, 1970).

Since both minimum and community custody allow a low degree of supervision, the detainer is virtually certain to preclude such classification assignments.

These tangible results of the detainer in turn affect the parolee's own incentive for rehabilitation and participation in prison programs, since at some stage the detainer will preclude further advancement. See *Smith v. Hoey*, 393 U.S. 374, 378-379 (1969).[13]

B. The liberty interests in the length of custody and conditions of confinement are protected by due process.

Liberty includes freedom from bodily restraint. *State Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Thus, confinement resulting from the refusal to allow the sentences to run concurrently may not be imposed without due process (*Morrissey v. Brewer, supra*) even if that period of restraint does not begin until a future date. *Peyton v. Rowe*, 391 U.S. 54 (1968). Good time credit, having been granted by statute and earned by the parolee, may not be denied without an opportunity to be heard. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Preiser v. Rodriquez*, 411 U.S. 475, 487-488 (1973). An inmate's current classification and his institutional program,

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[13]To avoid the adverse results, state parole detainers and those based on criminal charges may be challenged in Federal courts. *Braden v. 30th Judicial Circuit Court of Kentucky, supra*, 410 U.S. 484; *George v. Nelson*, 399 U.S. 224 (1970); *Cooper v. Lockhart, supra*. Some Federal courts have directed that Federal prisons give no effect to unprocessed state detainers lodged against inmates of Federal institutions. *Wingo v. Ciccone*, 507 F.2d 354 (8th Cir. 1974); *Mattingly v. Ciccone*, 503 F.2d 502 (8th Cir. 1974); *McEachern v. Henderson*, 485 F.2d 694 (5th Cir. 1973); see also *Shelton v. Meier*, 485 F.2d 1117 (9th Cir. 1973). Similarly, unprocessed Federal detainers should not be permitted to have their adverse effects.

having been established in accord with Bureau of Prisons standards and protected by Bureau of Prisons procedures, may not be made substantially more restrictive without procedural due process. *Wolff v. McDonnell, supra,* 418 U.S. at 547, 571; *Haines v. Kerner,* 404 U.S. 519 (1972).[14] Nor may he be deprived of a more favorable prison classification and the right to participate in programs for which he is otherwise eligible without due process. *Cardaropoli v. Norton,* 523 F.2d 990, 994-995 (2d Cir. 1975); see *Hampton v. Mow Sun Wong,* 44 U.S.L.W. 4737, 4741 (Sup. Ct., June 1, 1976); *Board of Regents v. Roth, supra,* 408 U.S. at 572; *Willner v. Committee on Character,* 373 U.S. 96, 102-103 (1963); *Speiser v. Randall,* 357 U.S. 513 (1958); *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117 (1926).

C. The liberty interest exists even if a parole violation is established.

Under the Board's rules and procedures, the finding of a violation does not preclude withdrawal or execution of the warrant and detainer. The Board goes beyond that to determine whether these favorable dispositions are appropriate [former 28 C.F.R. §2.56(b) (1975)]. Thus, under the rules, even if the violation is a new conviction, the parolee has the right to "communi-

[14]In *Baxter v. Palmigiano,* 96 Sup.Ct. 1551, 1560 (April 20, 1976), the Court declined to rule on what due process was required in prison disciplinary proceedings where the records did not reveal the liberty which was lost by the inmate. However, here the effect of the detainer can be demonstrated by examining the Bureau of Prisons policies.

cate with the Board relative to disposition of the warrant," and to dispositions of withdrawal or execution of the warrant. Former 28 C.F.R. §2.53(a) (1975)]. This communication is assumed to entitle the parolee to present mitigating evidence with respect to the new crime or relevant to the parolee's reputation and conduct in the community. *Jones v. Johnston, supra,* slip op. at 17-18.

There can be no doubt that in Federal parole proceedings the dispositional decision has traditionally been determinative of liberty interests. See *United States ex rel. Obler v. Kenton,* 262 F.Supp. 205, 208-9 (D. Conn. 1967); *United States ex rel. Vance v. Kenton,* 252 F.Supp. 344, 346 (D. Conn. 1966); Note, *Parole Revocation in the Federal System,* 56 Geo. L. J. 705, 717-718 n.101, 731 (1968).[15] Indeed, according to Parole Board Chairman Maurice Sigler, even under the challenged procedures, from a group of 30 parolees convicted of new crimes and given dispositional reviews, one-third received withdrawal or execution of the warrant. Affidavit of Chairman Sigler quoted in *Jones v. Johnston, supra,* slip op. at 16-17 n.6; see also *Smith v.*

[15]In *Smith v. Rivers,* 388 F.2d 567, 575 (D.C. Cir. 1967), the issue of what procedures were necessary for disposition of pending Federal parole violation warrants was avoided because the Board issued a new set of rules [32 Fed.Reg. 15014 (1967)], which ostensibly established a fair procedure for disposing of detainers. The court of appeals said:

> [W]e are not prepared to hold that failure to afford a procedure whereby the violator may seek a favorable disposition, or an outright refusal to consider proffered evidence in mitigation, is immune from judicial overview. 388 F.2d at 576.

Rivers, supra, 388 F.2d at 576 n.18.

Reflecting the importance of the dispositional decision to the parolee's liberty interests, both *Morrissey v. Brewer, supra,* 408 U.S. at 478-480, 483-484, 488, and *Gagnon v. Scarpelli, supra,* 411 U.S. at 787, 790, hold that this discretionary aspect of the revocation decision may be exercised only after a prescribed due process hearing. The hearing will enable the Board to have an accurate knowledge of the parolee's behavior (*Morrissey v. Brewer, supra,* 408 U.S. at 484), and to consider whether the facts as determined warrant revocation. The parolee "must have an opportunity to be heard and to show . . . that circumstances in mitigation suggest that the violation" should not result in unfavorable dispositions (*Morrissey v. Brewer, supra,* 408 U.S. at 488), and this opportunity must be given although "in most cases" the parolee has been convicted of another crime or has admitted the charges (*Gagnon v. Scarpelli, supra,* 411 U.S. at 787).[16] Indeed, because the dispositional aspect of the hearing is important to the parolee's liberty, *Gagnon* provides counsel even where the alleged violation is admitted or is a matter of public record if the reasons making revocation inappropriate are such

[16]In light of *Gagnon,* the Government is in error when it relies on one sentence in *Morrissey* for the position that no hearing is required when the violation is established. Moreover, that language in *Morrissey,* 408 U.S. at 490, is that a violation may be reasonable grounds for revoking parole under *state standards.* However, under Federal standards the fact of a conviction alone does not produce reasonable grounds for an unfavorable disposition until the whole of the parolee's record is reviewed. See post at 20, n.18.

that the parolee needs assistance in their presentation (411 U.S. at 790).[17]

The broad discretion permitted the Board in making its disposition only emphasizes that the discretion must be exercised after a fair proceeding. *Goss v. Lopez,* 95

[17]In *Gaddy v. Michael, supra; Small v. Britton, supra; Cook v. United States Attorney General, supra; Reese v. United States Board of Parole, supra;* and *Orr v. Saxbe, supra,* the courts of appeal concluded that the petitioners' failure to show evidence in mitigation either at the belated parole revocation hearing or at the proceeding on the writ of habeas corpus indicated that they were not prejudiced by the Board's procedures. However, the likelihood of success in each case is not relevant to the question of what procedures should be generally used. If due process protects the liberty interest, each individual must be afforded an opportunity to make his own case. *Fuentes v. Shevin,* 407 U.S. 67, 87 (1972); *Stanley v. Illinois,* 405 U.S. 645, 654-655 (1972); *Bell v. Burson,* 402 U.S. 535, 541 (1971); *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424 (1915). Moreover, case by case determination of whether an unreasonable delay in the parole hearing resulted in prejudice requiring release is likely to increase the number of requests for judicial determination of the issue by petitions for writs of habeas corpus. See *Jones v. Johnston, supra,* slip op. at 35. A timely parole hearing would avoid such a result.

In addition, here no parole hearing has ever been granted to petitioner, and the Board's position is that none need be given. There is no indication in the record that petitioner was advised that he could submit evidence on his own behalf or that he would have been able to do so without assistance. Compare *United States ex rel. Hahn v. Revis, supra,* 520 F.2d at 638, where complicated mitigating facts were presented by counsel. The denial of the *pro se* petition for writ of habeas corpus was premised entirely on the holding that no parole hearing need be given prior to the expiration of the intervening sentence.

Sup. Ct., 729, 737 (1975); *Board of Regents v. Roth, supra,* 408 U.S. at 576 n.15; *Morrissey v. Brewer, supra,* 408 U.S. at 483; *Willner v. Committee on Character, supra,* 373 U.S. at 103; *Goldsmith v. Board of Tax Appeals, supra,* 270 U.S. at 123. Nor, indeed, is the discretion so expansive as the Government's argument would have it. At least since December 1971, the Board has stated that its policy is that "information to sustain revocation shall consist of the fact of violation, plus consideration of whether or not the parolee is a good parole risk."[18] See *Preston v. Priggman,* 496 F.2d 270, 274 (6th Cir. 1974); *Caton v. Smith,* 486 F.2d 733, 735 (7th Cir. 1973); Note, *Parole Revocation in the Federal System, supra,* 56 Geo. L.J. at 717-718 n.101, 724.

The purpose of the due process proceeding required here is to minimize unjust revocation so that the parolee will not be detained longer than necessary. The hearing will also help to prevent the in-prison consequences of a detainer left pending without justification. The mere pendency of a parole violation detainer is likely to be used in the prison classification procedure not only as a measure of increased escape risk, but also as an adverse index of the parolee's ability to function under reduced supervision. However, a decision by the Parole Board to withdraw or execute the warrant and detainer is a finding that the parolee is a "good risk" and can comply with

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[18]United States Board of Parole Policy Paper on Parole Revocation at 13 (December 1971), attached to Bureau of Prisons Policy Statement No. 40100.18 (February 2, 1972).

conditions of reduced supervision. A favorable Parole Board decision is thus likely to result in a more advantageous prison classification assignment.

The hearing will enable the Board to exercise its discretion more accurately, for the decision will be premised on knowledge of the facts. *Morrissey v. Brewer, supra,* 408 U.S. at 484. See *Goss v. Lopez, supra,* 95 Sup. Ct. at 739; *Fuentes v. Shevin,* 407 U.S. 67, 80-81 (1972); *Jones v. Johnston, supra,* slip op. at 18-19, 43-44. The hearing does not, however, interfere with the Board's discretionary power to render what it considers to be an appropriate decision. *Morrissey v. Brewer, supra,* 408 U.S. at 483.[19]

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[19]This distinction was overlooked in *Gaddy v. Michael, supra,* 430 F.2d at 678, where the court held there was no right to an opportunity to present evidence in favor of a specific disposition. Petitioner's analysis does not affect the principle of *Zerbst v. Kidwell, supra,* 304 U.S. 359; see, *e.g., Nash v. Moseley,* 433 F.2d 923 (10th Cir. 1970); *Adams v. United States,* 432 F.2d 62 (5th Cir. 1970); *Moore v. Smith,* 412 F.2d 720 (7th Cir. 1969), that service of an intervening Federal sentence does not automatically continue the running of the original term of imprisonment.

Further, the constitutional question is not answered by the position in *Small v. Britton, supra,* and *Cook v. United States Attorney General, supra,* that under the language of former 18 U.S.C. §4207 (1970) a hearing constitutes execution of the warrant and that therefore a hearing could be denied to prevent automatic sentence concurrency. If petitioner is constitutionally entitled to a hearing, the statute must be reinterpreted. See *Jones v. Johnston, supra,* slip op. n.40 at 33; *Cleveland v. Ciccone, supra,* 517 F.2d at 1087.

D. A *Morrissey* hearing is required.

Since the disposition portion of the revocation hearing may seriously abrogate a parolee's liberty interests, it should be conducted "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Morrissey* dictates both the procedure (408 U.S. at 489) and the timing (408 U.S. at 488) of the hearing. Contrary to *Morrissey*, in this case there was no hearing. The record shows that petitioner wrote to the Board requesting execution of the warrant and, in response, received only a letter saying that he would be taken into custody at the end of his intervening sentence.[20] If under Board procedure a hearing were granted at that time [former 28 C.F.R. §2.55 (1975)], eight years after petitioner's request,[21] the hearing

[20]Under former 28 C.F.R. §2.53(a) and its predecessor, the Board should have conducted a dispositional review of a parolee's case when he requested a decision. There is no indication that such a record review (see *United States ex rel. Hahn v. Revis, supra*, 520 F.2d at 638) was made here. Moreover, a record review does not comply with due process standards of *Morrissey*.

Under the rules, the Board also had the power to grant a discretionary dispositional interview. However, it did not do so here. What is more, a discretionary hearing does not comply with due process. *Coe v. Armour Fertilizer Works, supra*, 237 U.S. at 424; *Cleveland v. Ciccone, supra*, 517 F.2d at 1088-1089.

[21]The record shows that petitioner's request was made some time during 1972; the decision was rendered on October 18, 1972. Since *Morrissey* requirements are not retroactive (*Morrissey v. Brewer, supra*, 408 U.S. at 490), petitioner's right to a hearing must be deemed to have accrued at least within a reasonable time after *Morrissey*.

would be too late to protect petitioner's liberty. It would not cure the harm caused by the denial of participation in prison rehabilitative programs or the deprivations of an improper prison classification. These are irremediable after the intervening sentence has been served.

Moreover, when the intervening sentence ends the Board loses the intermediate option of revoking parole but permitting some time of the two terms to run concurrently, for the language of neither former 28 C.F.R. §2.53 (1975) nor former 28 C.F.R. §2.55(c) (1975) authorized the Board to grant partially retroactive concurrent sentences. Therefore, a hearing held at the end of the intervening sentence cannot cure the substantial losses produced by delay.

Postponement of the hearing is also destructive of the petitioner's ability to show that he merits withdrawal of the warrant altogether so that good time and street time credit are not forfeited. Mitigation evidence the parolee might have gathered earlier becomes stale and unpersuasive.[22] The ineffectiveness of such evidence is highlighted by changes in personal relationships which necessarily result from the parolee's incarceration. Helpful evidence not previously obtained may be forever lost by the delay. Witnesses may become unavailable or uninterested many years later.

Furthermore, a delay in the hearing will render ineffective the *Morrissey* requirement of disclosure to

[22]The record does not reveal whether petitioner was notified about or had any knowledge of his right to present written evidence in mitigation to the Board. If he was not notified of his opportunity to present such evidence, the Board's actions deprived him even of the minimal procedures granted.

the parolee of the evidence against him,[23] for after the lapse of time he may be unable to respond to errors, inaccuracies, or incompleteness in the Board's records. *Mathews v. Eldridge*, 96 Sup. Ct. 896, 908 (February 24, 1976). These problems, caused by the delay, leave petitioner's liberty interests unprotected.[24]

Under *Morrissey*, the hearing must not only be timely, but the parolee must be present. Presence is significant for the parolee may not be aware of matters in which the examiner has an interest or about which he wishes to make inquiry. Compare *Mathews v. Eldridge, supra*, 96 Sup.Ct. at 907-908. Thus, a face-to-face

[23]The Board's usual procedure is to make a record review of all documents at its disposal [Parole Form H-6, H-3(a)]; affidavit of United States Board of Parole Chairman Maurice Sigler quoted in *Jones v. Johnston, supra*, slip op at 4, n.4; *Gagnon v. Scarpelli, supra*, 411 U.S. at 784, n.8; Johnson, *Federal Parole Procedures*, 25 Admin. L. Rev. 459, 487-489, 509-513 (1972).

[24]The Board has asserted that a delay in the hearing is necessary so that information about the parolee's prison conduct can be obtained and perhaps influence a favorable disposition. See *Reese v. United States Board of Parole, supra; Orr v. Saxbe, supra*. However, the Board's ability to consider the prison behavior and record of the parolee was not impaired by provision of a timely hearing. Under former 28 C.F.R. §2.53(c) (1975), the Board had the institution record made available to it on an annual basis and, even if an unfavorable decision was initially made, the Board could reopen the case for further consideration based on the prison record. Former 28 C.F.R. §2.28 (1975); *Jones v. Johnston*, slip op. at 19, 25; see also *Wolff v. McDonnell, supra*, 418 U.S. at 560-561. If the parolee desires to have the Board postpone the hearing in order to consider his prison record, he should be permitted this choice by his waiver of a timely due process proceeding. However, his right to a hearing should not be denied him on this premise.

meeting is necessary so that the parolee can focus his responses to the inquiries of the examiner. Moreover, the evidence presented by the parolee relating to his conduct, activities, and reputation, will inevitably raise questions of credibility and demeanor. If the parolee cannot produce specific factual information, either through his own testimony or otherwise, to support his position, his credibility is weakened. *United States ex rel. Hahn v. Revis, supra*, 520 F.2d at 639.

The *Morrissey* hearing held early during the intervening sentence should not cause financial or administrative burdens which outweigh the due process requirements. *Gagnon v. Scarpelli, supra*, 411 U.S. at 782 n.5. Indeed, where, as here, the parolee is in a Federal institution, there is minimal added burden. The Board or its examiners regularly sit at each institution, and cases such as petitioner's can be added to the docket and heard by the examiners present.

Moreover, the division of the Board into a minimum of five regions (18 U.S.C. §4203(a)(2), 90 Stat. 220) and the power to delegate authority to conduct hearings to local Federal executive and judicial officers (18 U.S.C. §4203(c)(3), 90 Stat. 220) offers the Board sufficient flexibility to arrange such procedures as are necessary.

E. Petitioner is entitled to dismissal of the warrant if he has been prejudiced by the delay, or alternatively to a prompt parole hearing.

Petitioner was entitled to a parole revocation hearing

within a reasonable period after *Morrissey* or after his request for disposition, whichever came later. Since no parole revocation hearing has been granted, petitioner is entitled to a hearing in the district court to determine whether he was prejudiced by the denial of the parole hearing. If he establishes prejudice, the writ of habeas corpus should issue. Alternatively, he should be given a prompt revocation hearing. Furthermore, to the extent that the time which remains to be served on petitioner's intervening sentence is less than the time owed on his original sentence, petitioner has been irretrievably denied the opportunity to serve the two sentences concurrently. Therefore, the Board should be directed to give him credit for that portion of his term regardless of the Board's decision since he was denied a fair opportunity to obtain his concurrency at the earlier date.

CONCLUSION

For the above-stated reasons, the order and judgment of the court below should be reversed.

Respectfully submitted,

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